Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1–24–194 OF 2002
VINCENT NG J
13 FEBRUARY 2003

Civil Procedure *— Execution — Charging order — Application for charging orders in respect of shares in a company — Whether charging order would be in violation of s 223 of the Companies Act 1965 — Companies Act 1965 s 223*

The plaintiffs obtained two summary judgments against the defendant dated 23 March 2000 and 16 June 2000 respectively for a total sum of RM4m. To execute the judgments, the plaintiffs took out an application for charging orders in respect of, inter alia, 2,660,002 shares in Biografik (M) Sdn Bhd which were registered in the defendant's name. The learned senior assistant registrar ('SAR') granted, inter alia, the charging order absolute in respect of the Biografik shares. The defendant filed an appeal against the decision of the SAR which was dismissed and the plaintiffs thereafter applied to execute the judgments. The defendant opposed the application on the grounds that the plaintiffs' application would be a violation of s 223 of the Companies Act 1965 ('the Act') as the defendant alleged that there were winding up petitions against Biografik.

Held, allowing the plaintiffs' application:

(1) Despite the defendant's attempt to blur the distinction between the company and its shareholders, it is trite law that the shareholder of a company is a distinct and separate legal entity from the company in which he holds shares (see p 527A–B); *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165 followed.

(2) The plaintiffs' application was for recovery of two money judgments against a defendant by means of charges against his personal property, which although was in the form of company shares, had nothing to do with the company itself (see p 527B–C).

(3) It is also trite law that s 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of individual shareholders. The sole test to determine whether execution of the charging order in the instant case was caught within s 223 was to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus, the words 'disposition of property of the company' ought to have been read conjunctively with the phrase 'and any transfer of shares or alteration in the status of the

members of the company' in s 223. The transfer of shares which does not entail or involve disposition or dissipation of the company's property did not come within the purview of s 223 (see p 527C–E). A

(4) Aside from the say-so of the defendant's solicitor, there was no evidence before this court that there actually was any winding up petition against Biografik (M) Sdn Bhd (see p 528C–D). B

[Bahasa Malaysia summary

Plaintif-plaintif mendapat dua penghakiman terus terhadap defendan yang bertarikh 23 Mac 2000 dan 16 Jun 2000 masing-masing untuk jumlah RM4j. Untuk melaksanakan penghakiman-penghakiman tersebut, plaintif-plaintif telah membuat permohonan untuk perintah-perintah gadaian untuk, antara lain, 2,660,002 saham di dalam Biografik (M) Sdn Bhd yang didaftarkan di atas nama defendan. Penolong kanan pendaftar ('PKP') yang arif telah memberi, antara lain, perintah gadaian mutlak berkenaan saham Biografik. Defendan telah memfailkan suatu rayuan terhadap keputusan PKP tetapi telah ditolak dan plaintif-plaintif telah memohon untuk melaksanakan penghakiman-penghakiman tersebut. Defendan telah membangkang permohonan-permohonan di atas alasan bahawa permohonan plaintif-plaintif akan melanggar s 223 Akta Syarikat 1965 ('Akta tersebut') kerana defendan mengatakan bahawa terdapat petisyen-petisyen penggulungan terhadap Biografik. C D E

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Walaupun defendan cuba mengaburkan perbezaan di antara syarikat dan pemegang-pemegang sahamnya, ia adalah undang-undang tetap bahawa pemegang saham adalah entiti undang-undang yang berlainan dan berbeza daripada syarikat di mana beliau memegang saham tersebut (lihat ms 527A–B); *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165 diikut. F G

(2) Permohonan plaintif-plaintif adalah untuk mendapat kembali dua penghakiman wang terhadap defendan melalui gadaian-gadaian terhadap hartanah peribadi beliau, yang walaupun adalah di dalam bentuk saham-saham syarikat, tidak berkait dengan syarikat itu sendiri (lihat ms 527B–C). H

(3) Ia adalah undang-undang tetap bahawa s 223 Akta tersebut terpakai kepada si piutang syarikat dan tujuan sebenarnya adalah untuk melindungi hartanah syarikat supaya dapat dibahagikan dengan sama di antara si piutang-si piutang syarikat yang tidak bercagar. Niat sebenar seksyen itu adalah untuk melindungi hartanah syarikat dan bukan pemegang-pemegang saham masing-masing. Ujian untuk menentukan sama ada pelaksanaan perintah gadaian di dalam kes ini termasuk dalam s 223 adalah untuk I

bertanya sama ada pelaksanaan seperti itu boleh menjejaskan hartanah syarikat dengan melaksanakan pemberimilikan yang tidak betul atau pembaziran hartanah syarikat. Oleh itu, perkataan-perkataan 'disposition of property of the company' sepatutnya dibaca bersama dengan frasa 'and any transfer of shares or alteration in the status of the members of the company' di dalam s 223. Pemindahan saham yang tidak melibatkan pelupusan atau pembaziran hartanah syarikat tidak termasuk di dalam skop s 223 (lihat ms 527C–E).

(4) Selain daripada apa yang dikatakan oleh peguamcara defendan, tidak ada sebarang keterangan di hadapan mahkamah ini untuk menunjukkan bahawa terdapat petisyen penggulungan terhadap Biografik (M) Sdn Bhd (lihat ms 528C–D).]

Notes

For cases on charging orders, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2255–2259.

Cases referred to

AI Levy (Holdings) Ltd, Re [1964] 1 Ch 19 (refd)
Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd [1985] 2 MLJ 165 (folld)
Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors [2002] 1 MLJ 89 (refd)
Denney v John Hudson & Co Ltd [1992] BCLC 901 (refd)
Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309 (refd)
Overseas Aviation Engineering (GB) Ltd, Re [1962] 3 All ER 12 (distd)
Wiltshire Iron Company, Re, ex parte Pearson [1868] 3 Ch App 443 (refd)

Legislation referred to

Companies Act 1862 [UK] s 153
Companies Act 1920 [UK] s 173
Companies Act 1948 [UK] s 227
Companies Act 1965 s 223

Trevor De Silva (*Shook Lin & Bok*) for the plaintiffs.
SS Tugal (*SS Tugal & Associates*) for the defendant.

Vincent Ng J:

Preamble

Enclosure 1 is the plaintiffs' application for, inter alia, an order for sale of shares subject to two charging orders absolute dated 8 February 2001 and 10 August 2001 respectively, and that the proceeds arising therefrom be

utilized towards satisfaction of two judgment debts due and owing by the defendant. A

Background

In order to fully appreciate the circumstances that led to this application, it is necessary to review the history of these proceedings. Briefly it is as follows. B

Vide Civil Suit No D1–22–1438 of 1999, the plaintiffs obtained two summary judgments against the defendant dated 23 March 2000 and 16 June 2000 respectively for a total sum of RM4m ('the judgments').

It is noteworthy that defendant did not appeal against the judgments so entered against him nor did he seek to stay the same. C

In an attempt to execute the judgments, the plaintiffs took out an application for charging orders in respect of 2,660,002 shares in Biografik (M) Sdn Bhd ('Biografik shares') and 100,001 shares in Inalap International Sdn Bhd ('Inalap shares'). At all material times, the shares were registered under the defendant's name. D

A consent charging order absolute was recorded in respect of the Inalap shares, whereas the learned senior assistant registrar ('SAR') granted the charging order absolute in respect of the Biografik shares after extensive submissions from both sides.

Needless to say, the defendant filed an appeal against the decision of the learned SAR, which has since been dismissed. E

Hence, this instant application to execute upon the judgments.

Sole point of law

The defendant did not file any affidavit opposing the application but sought instead to rely on a sole point of law. F

It is pertinent to note that the defendant's objection (as was the case during the charging order stage) was only in respect of the Biografik shares.

The sole ground of the defendant's challenge to the plaintiffs' application was founded on s 223 of the Companies Act 1965 ('the Act') which reads as follows: G

> Any *disposition of the property of the company* including things in action *and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding* up by the court shall *unless the court otherwise orders be void.* (Emphasis added.)

H

It was the defendant's contention that in light of the alleged couple of winding up petitions against Biografik (M) Sdn Bhd commenced prior to this instant application, any transfer of Biografik shares would be an alteration in the status of the members of the company, and that s 223 of the Act comes into play, as the plaintiffs failed to secure the benefits of the charging orders before the commencement of the winding up. Further, the defendant argued that it was only opened to the winding up court to make an order under s 223 of the Act. I

A In essence, it was the argument of the defendant that to allow this application would be to allow a violation of s 223 of the Act.

Despite the defendant's attempt to blur the distinction between the company and its shareholders, it is trite law that the shareholder of a company is a distinct and separate legal entity from the company in which B he holds shares (see *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165 at p 167).

The plaintiffs' application is for recovery of two money judgments against a defendant by means of charges against his personal property, which although is in the form of company shares, has nothing to do with the C company itself. In other words, the plaintiffs are the creditors of the shareholder, not the company.

It is also trite law that s 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's D property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of the charging order in the instant case is caught within s 223, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus, I would hold that the words 'disposition E of property of the company' ought logically be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of the members of the company' in s 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223.

This has been clearly elucidated by Lord Cairns LJ in *Re Wiltshire Iron* F *Co Ltd ex p Pearson* (1868) 3 Ch App 443, when he considered the English equivalent of our s 223, at pp 446–447:

> [Section 153] [Companies Act 1862] no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for G winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of *the property of a company in extremis*. (Emphasis added.)

In a subsequent case, *Re AI Levy (Holdings) Ltd* [1964] 1 Ch 19, Buckley J H opined, at pp 27–28, that the object of s 227 of the Companies Act 1948 (which is similar to s 173 of the Companies Act 1920):

> ... is to protect the interests of the creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present I terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders; ...

(See also *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; *Denney v John Hudson & Co Ltd* [1992] BCLC 901 and *Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89.)

Conversely, the defendant's unconventional interpretation of s 223 of the Act is unsupported by any case law. Reliance on *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 is clearly flawed as Lord Denning's judgment, at p 14, starts out by identifying that:

> The facts are simple. On 16 August 1961, Jarvis & Sons, Ltd obtained *judgment against Overseas Aviation, Ltd* for ... . (Emphasis added.)

Clearly, the case essentially concerns an attack against the subject company's property rather than its shareholders' property.

The application

Lastly, the defendant was faced with another impediment which he was unable to hurdle. Aside from the say-so of the defendant's solicitor, there was no evidence before this court that there actually was any winding up petition against Biografik (M) Sdn Bhd.

The conclusion

Interesting as the defendant's submission was, I found it merely to be an attempt to delay the plaintiffs enjoying the fruits of their judgments. I therefore allowed the plaintiffs' application in encl 1, prayers (1)– (7).

Plaintiffs' application allowed.

Reported by Chew Phye Aun